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Frank E. Douglas and Drue E. Douglas v. R. C. Duvall : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK E. DOUGLAS, and
DRUE E. DOUGLAS,
Plaintiffs and Appellants,

— vs. —

R. C. DUVALL,
Defendant and Respondent.

Case No.
8484

Appellants' Brief

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STATEMENT OF FACTS

This is an Appeal from a verdict of a jury rendered in the above entitled cause on the 3rd of November, 1955. The action was originally commenced by Appellants against Respondent to recover damages which the Plaintiffs claimed resulted from the false and fraudulent representations of the Defendant. The Defendant, R. C. Duvall, is the President of the Ogden First Federal Savings & Loan Association and a director of the Commercial Security Bank. He has been engaged in the

savings and loan business in Ogden for approximately 20 years. Prior to the time of his coming to Ogden, he had experience in oil and gas operations (Tr. 94). Some years prior to 1950 Mr. Duvall became interested in a mining prospect in Southwestern Idaho known as the Sundance Mine. For several years exploratory work was done by Mr. Duvall and two associates, Mr. Froerer and Mr. Barrett. In the summer and fall of 1949 a Mr. Roger Pierce, a mining engineer, was employed to make a survey and report on the ore located on the property.

Mr. Pierce submitted his report on or about January, 1950 (Tr. 96) in which he stated that results of diamond drilling "indicated large widths of mineralization that for the most part assayed too low to be of commercial value." He further reported that, based upon other information, including information obtained from tunneling he would conclude that "including the area developed and reasonable extensions beyond developed phases, there is indicated 200,000 tons of provable and probable ore reserves having a value of about $7.00 a ton." (Tr. 96) On a basis of 90 per cent recovery, Mr. Pierce stated that Mr. Duvall should expect to be able to realize approximately $6.30 per ton out of the ore and that actual mining costs should amount to about $1.75 per ton and milling costs 90c per ton. This cost, together with a royalty of 10 per cent payable to the land owner (63c per ton), would make a mining cost of $3.28 per ton (Tr. 97). No report was made or estimate given on general overhead or operating and managerial costs.

Thereafter, in March of 1950 Mr. Duvall and his associates organized a corporation for the purpose of engaging in mining the properties which then became known as the Duvall Mine. At the time of incorporation, Mr. Duvall claimed to have put into the properties about $16,000.00 in development and exploration (Tr. 428). The properties were turned into the Corporation at a value of $700,000.00 and stock issued to Mr. Duvall and his family of a par value of $480,000.00. No actual cash was paid into the Corporation by any of the incorporators. (Exh. K)

About the time of the incorporation, Mr. Duvall called Appellant Frank Douglas, a practicing dentist in Ogden, to Duvall's office at the Ogden First Federal Savings & Loan Association and, as a result of the representations made to Douglas and his wife, induced them to loan to the Duvall Company the sum of $20,000.00 (Tr. 23-32). In order to advance the money to the Duvall Mining Company, Dr. and Mrs. Douglas borrowed $20,000.00 and a note was signed by Mr. Duvall on behalf of the Duvall Mining Company on a form used by the Ogden First Federal in the amount of such loan. In addition to giving the note, Mr. Duvall also transferred to the Douglases 2400 shares of the capital stock of the Duvall Mining Company (Tr. 66).

Subsequent thereto the Douglases from time to time advanced to the Duvall Mining Company various sums of money until the total of $57,686.20 was loaned. In the fall of 1950 $686.20 was advanced on a purported assess-

ment of stock for which a note was taken. In December of 1950 a loan of $15,000.00 was made. At this time, in order to obtain the funds to make the loan Dr. and Mrs. Douglas had to mortgage their home, which they did to the Ogden First Federal at the instance of Mr. Duvall. During the interim, considerable improvements had been made at the mine by the construction of facilities for mining and milling the ore. The mine itself went into production about September 1, 1950. During its operation in 1950 and part of 1951 the mine was under the direction of Mr. Miles P. Romney, who prior to his association with the Duvall Mining Company was employed by the United States Smelting, Refining and Mining Company. He also had assisted in the examination of the properties by Mr. Pierce (Tr. 308), and directed the construction of the Mill in the spring of 1950 (Tr. 315). The mining operations closed down about the 30th of November, 1950 (Tr. 316), at which time Mr. Romney gave to Mr. Duvall a written report showing the results of operations from September to December, including amount of ore produced, gold recovery therefrom, cost of production, and loss on operation (Exhibits H and I). The information contained in this report, however, was available to Mr. Duvall before the report was made, since Mr. Duvall was in close contact with the mining operation, knew the amount of tonnage being produced, and value of the gold content thereof, and the actual amount of gold recovered (Tr. 102, 103). He was also acquainted with the costs of operations, issued the checks in payment of the bills, and was aware in the latter part of November and first part of December that there had

been a considerable loss in operations and that it would be necessary to obtain from $15,000.00 to $25,000.00 to pay the outstanding bills on the operation (Tr. 492).

This was the situation in December 1950 when Dr. and Mrs. Douglas were again asked by Mr. Duvall to loan some money to the mining company, but no reference to the actual financial situation was made by Mr. Duvall when he approached the Douglases on the matter of a further loan.

Again, in May of 1951, shortly after operations commenced in that year, Dr. Douglas, at the request of Mr. Duvall, loaned the company $5,000.00 which he obtained by increasing the mortgage on the home, which in the meantime had been reduced by substantial payments thereon. In the late fall of 1951 Dr. Douglas was able to discharge the mortgage at the bank and within a few days thereafter he was again approached by Mr. Duvall to loan the company additional money and to re-mortgage his home for that purpose. This was done, and on December 26, 1951 a further loan of $15,000.00 was made. A month or two prior to making this loan Dr. Douglas read an article in the Ogden Standard Examiner concerning the purported rich gold deposit being operated by the Duvall Mining Company (Tr. 41). This article appears as Exhibit G, and gives similar information to that claimed by Appellants to have been given by Mr. Duvall when the first loan was made. The information for the article and accompanying pictures were furnished by Mr. Duvall (Tr. 120, 121).

The last loan was made in July of 1952, when Appellants withdrew $2,000.00 from their childrens' savings accounts in the Ogden First Federal Savings & Loan Association and loaned that to the Duvall Company, thereby making a total of $57,686.20 loaned by them to the Duvall Company over the period of time involved.

The Duvall Mine continued to operate in the year 1951 from early spring until late fall and also in the year 1952. However, value of the ore mined continued to be considerably less than $7.00 per ton; and the costs of production, including general overhead costs and managerial salaries, exceeded the amount received from the ore by $2.00 to $7.00 per ton. The production figures (Exhibit M) show that in 1950, 4,491 tons of ore were produced, from which $8,767.67 was received or $1.95 per ton. During the same period of time costs of production were $42,620.81 for a cost of $9.41 per ton, making a net loss of $7.54 per ton. Thus, the more ore the company attempted to produce, the greater its total loss became, although in the year 1953 it was able to reduce the loss per ton to $2.40.

In the fall of 1953 within a few days after having met Dr. Douglas on the street and telling him that everything was doing fine, the company had made a substantial profit for the year, that all debts had been paid, and that everything was in readiness to return some of the money to the investors; Mr. Duvall called a meeting and announced that they were through (Tr. 56). By that time the company had mined a total of 113,409 tons of

ore at a loss of $379,756.31 (Exhibit L). According to Mr. Duvall, there was no further ore of commercial value left; that diamond drilling had disclosed the ore to be of too low a value to be mined commercially (Tr. 138). (This was the same conclusion which had been given by Mr. Pierce and Romney in respect to the diamond drilling which had been done in the summer of 1949.)

Dr. Douglas, claiming that he relied upon the representations made by Mr. Duvall in the spring of 1950, and upon the statements made and the information given subsequently, and having no information concerning the actual financial condition of the company and its losses during the time that the loans were made, commenced this action against Mr. Duvall alleging in his Complaint that the amounts loaned by plaintiff and his wife were as a result of false and fraudulent representations made to them by Mr. Duvall. The action was tried in Ogden, Utah, before a jury. At the conclusion of the trial the Court submitted to the jury 54 written interrogatories to be answered, and which required every interrogatory to be answered in the affirmative in order for the Plaintiff to recover. After several hours of deliberation, the jury answered all of the interrogatories except the last one in the negative. These interrogatories were the same as to each of the six different loans or advances made and were as follows:

> "1. Were the representations or any of them made when and as alleged?
>
> "2. Were such representations, if any you find, concerning a presently existing, material fact?

"3. Were such representations (if any you find) false?

"4. Did the defendant then and there know that said representations (if any you find) were false or make such statements recklessly knowing that he had insufficient knowledge upon which to base such positive assertions, if any were made?

"5. Were such false representations (if any you find) made by the defendant for the purpose of inducing the plaintiffs to act on the same?

"6. Did the plaintiffs act reasonably and in ignorance of the falsity of said representations (if any you find)?

"7. Did the plaintiffs in fact rely on said representations (if any you find)?

"8. Were the plaintiffs then, there and thereby induced to act by parting with their money?

"9. How much by way of money damages, if any you find, did plaintiffs sustain by reason of the acts and conduct of the defendant." (R. 82-87)

In preparing for the argument of the case to the jury counsel for Appellant obtained a transcript of a portion of the testimony of the Defendant Duvall, intending to read to the jury the testimony of Mr. Duvall with respect to the alleged representations made by him to the Douglases. When counsel for Appellants announced to the jury that he expected to read the actual testimony, Defense Counsel objected, whereupon the Court sustained the objection and refused to allow counsel for Appellants to read such portion of the transcript.

STATEMENT OF POINTS

In connection with this Appeal, Appellants cite as error the action of the trial court in submitting the case to the jury on special interrogatories, claiming that various instructions and comments of the Court were improper, as well as refusing to allow counsel to read a portion of the transcript of the testimony. The points relied upon by Appellants for reversal of the judgment and the matters which are claimed to be error on the part of the trial court are as follows:

1. The court erred in submitting the matter to the jury on written interrogatories.

2. The court erred in instructing the jury that it was necesary for them to find the claimed representations to have been made as and when alleged in the Complaint, without advising the jury that such representations could be proved in substance and effect.

3. The court erred in refusing to instruct the jury that when a representation was made, if any should be found by the jury, it could thereafter be relied upon as a continuing statement of fact with the same force and effect until it was known or should have been known to the Plaintiffs that such representation was in fact false.

4. The court erred in instructing the jury in effect that Dr. Douglas was a director and as such had knowledge of the affairs of the Duvall Company. (Tr. 575)

5. The court erred in commenting on the weight of the evidence in stating to the jury, "I charge you that a man can't plug up his ears and not observe what a reasonable person should observe and not learn what the reasonable person should learn and not hear what was said, if anything was said, concerning the operation of this company." (Tr. 575)

6. The court erred in commenting to the jury, "Now, if you find that something like that happened, of the nature that a reasonable man ought to act on, then you can't award judgment on some representation, because a man can't blow hot and cold. He either relies or he doesn't rely, and he sees the sun come up in the morning or he doesn't see the sun come up in the morning. If he hears certain things he hears certain things, and if he sees a report he sees a report, and he is charged with what's in there." (Tr. 576)

7. The court erred in refusing to allow counsel to read a portion of the transcript of the testimony in the closing argument.

8. In any event the court erred in failing to direct a verdict in whole or in part for the Plaintiffs in connection with their Complaint.

The foregoing statement of points will be consolidated for the purpose of argument into the following propositions:

I

The court erred in submitting the matter to the jury upon special interrogatories.

II

The court erred in its instructions to the jury.

III

The court erred in commenting upon the evidence during the course of its Instructions.

IV

The court erred in refusing to allow counsel to read from a transcript of the testimony in closing argument.

V

The court erred in refusing to direct a verdict in favor of the Plaintiffs upon all of part of Plaintiffs' complaint.

ARGUMENT

I

THE COURT ERRED IN SUBMITTING THE MATTER TO THE JURY UPON SPECIAL INTERROGATORIES.

It is significant in this case that because the matter was one involving an action for fraud, that at the outset Plaintiffs had the responsibility of proving such fraud by clear and convincing evidence. Too, there were six

different transactions in which the Plaintiffs had loaned or advanced money to the Duvall Company at the instance and request of the Defendant Duvall so that insofar as attempting to present the matter to the jury upon special intorrogatories the court was under the responsibility clearly and specifically to define the issues to the jury and to take from them all matters which in any event would not be material for them to consider.

For instance, if the case were to be submitted properly to the jury upon interrogatories the court should have instructed the jury as a matter of law, that if they found that the Defendant represented to the Plaintiff that not less than 300,000 tons of ore had been blocked out, such representation was a false representation. The report of Mr. Pierce, which had been written up as a result of his survey of the property and tunneling, clearly states that not to exceed 200,000 tons of ore was blocked out, including both the proven and probable reserves (Tr. 96). Nor does the evidence disclose that such report was made as a result of diamond drilling, although Plaintiffs claimed that the Defendant represented to them that the ore which was proven and blocked out was ascertained as a result of diamond drilling. Obviously, use of the phrase "diamond drilling" would be more persuasive in indicating that there was no question with respect to the nature and extent of such ore than to say the only basis for concluding there was a quantity of ore blocked out was as a result of tunneling or survey. The very fact that in the operation of the mine no ore of commercial value was produced and only a total of 113,409 tons of

ore were mined is indicative of the fact that without diamond drilling it was impossible to determine the extent of the ore body. Of further significance is the fact that the original diamond drilling done, and which was referred to by Mr. Pierce in his report, disclosed that there was no ore of commercial quantity or value on the property. Notwithstanding the foregoing undisputed evidence the court submitted to the jury not only whether the statement claimed by the Plaintiff to have been made by the Defendant that no less than 300,000 tons of ore had been blocked out as a result of diamond drilling was in fact made, but also whether such statement was false.

The manner in which the interrogatories were phrased would indicate that the jury was to answer whether any particular representation concerned a presently existing material fact or was false only if the jury should first find that a representation was made. All of the questions following Interrogatory Number 1 are conditioned upon the jury finding that a representation was made. Therefore, in answering the interrogatories subsequent to Number 1 the jury must have determined that certain representations were made by the Defendant to the Plaintiffs as alleged in Plaintiffs' Complaint.

Although written interrogatories are specifically authorized under the provisions of Rule 49, U.R.C.P., within the trial court's discretion, nevertheless it has been held that answers to such interrogatories cannot be inconsistent. In 53 Am. Jur. TRIAL, Section 1082, p. 750 appears the following statement:

"Inconsistent and conflicting findings in special verdicts and answers to interrogatories neutralize each other and must be disregarded. Therefore, if findings are made which are contradictory as to material facts, such facts are left undetermined and since it is not the province of the court, unless by consent, to determine them, no judgment can be rendered."

In the case of Great Western Land and Improvement Co. v. Sandygren, 141 Wn. 451, 252 Pac. 123, the Plaintiff company sought to recover on two promissory notes executed by Defendant to a C. W. Brockman and by him transferred to a bank which in turn negotiated the notes to the Plaintiff. The Defendant contended that the notes were given as a result of false and fraudulent representations and that the Plaintiff acquired the notes with knowledge of the fraud. At the conclusion of the trial the jury returned a general verdict in favor of Defendant, at the same time answering certain interrogatories. Questions 3, 4 and 5, with the answers, were as follows:

"Special Verdict No. 3. If you answer special Verdict No. 1 in the affirmative state if the First Exchange National Bank of Coeur d'Alene, Idaho, purchased said notes in good faith. Answer: No.

"Special Verdict No. 4. If you answer special verdict No. 1 in the affirmative, state if the First Exchange National Bank of Coeur d'Alene, Idaho, had at the time of purchase any notice of any alleged false and fraudulent representations made by Brockman to the defendant by which she was induced to sign the notes. Answer: No.

"Special Verdict No. 5. If you answer Special Verdict No. 4 in the negative, then answer if the

plaintiff was a party to any fraud or illegality affecting these notes? Answer: Yes."

In considering the effect of these answers, the court held:

"Special Verdict No. 3, that the Idaho bank did not purchase the notes in good faith, is not inconsistent with the general verdict in favor of Mrs. Sandygren. That special verdict, standing alone, supports the general verdict.

"Special Verdict No. 4, that the Idaho bank, at the time of purchasing the notes, had no notice of any alleged false and fraudulent representations made by Brockman to Mrs. Sandygren by which she was induced to sign the notes, is inconsistent with the general verdict in favor of Mrs. Sandygren. That special verdict, standing alone, would call for the judgment which was rendered in favor of the improvement company notwithstanding the general verdict in favor of Mrs. Sandygren.

"Special Verdict No. 5 has no other effect than to place the improvement company in the shoes of the Idaho bank; that is, to render the improvement company chargeable with notice of infirmities in the notes as the Idaho bank was so charged.

"It seems to us that these considerations call for the conclusion that the improvement company is not entitled to judgments upon the notes notwithstanding the general verdict in favor of Mrs. Sandygren, because special verdict No. 4, upon which such judgment must rest, is plainly negatived by special verdict No. 3. In other words, reading these two special verdicts together, they do not clearly show the improvement company entitled to judgments notwithstanding the general

verdict. They are so contradictory as to destroy each other in so far as either lends support to judgments in favor of the improvement company. We are therefore of the opinion that the trial court was in error in rendering judgments in favor of the improvement company upon the theory that the special verdicts call for such judgments notwithstanding the general verdict.

"It seems to us that Mrs. Sandygren must also fail in her claim for judgments in her favor upon the general verdict, since special verdict No. 4 negatives her right in that behalf, though special verdict No. 3 supports her claim in that behalf. *There is a sense in which these two special verdicts may be considered as destroying each other. They do have that effect in so far as either can be the basis, standing alone, of any judgment for or against either of the parties to this action.* But we think special verdict No. 4 also destroys the effect of the general verdict in favor of Mrs. Sandygren. For, manifestly, if the notes were purchased by the Idaho bank without notice of the alleged false and fraudulent representations made by Brockman to Mrs. Sandygren inducing her to execute them, the general verdict in her favor could not have been correctly rendered by the jury. *Noting this inconsistency between special verdict No. 4 and the general verdict, and the inconsistency between special verdict No. 3 and special verdict No. 4, it is plain, we think, that the jury did not at all comprehend the issues in the case, and that therefore Mrs. Sandygren, as well as the improvement company, is not entitled to judgment in her favor upon the general verdict.* The problem is an involved one by reason of this double inconsistency. We do not deem it necessary to here notice the numerous decisions of the courts touching the general subject. In 38 Cyc. 1926, and

27 R.C.L. 879, are found observations which we regard as lending support to our conclusion that no judgment can be rightfully rendered upon this record in favor of either the improvement company or Mrs. Sandygren.

> "What then shall we do with the case? The answer to this question, we think, is found in the fact that the case remains undisposed of, and without a record enabling the superior court or this court to lawfully pronounce a final judgment for or against either of the parties. This manifestly means that the case should be regarded as still pending and undisposed of, and that therefore a new trial should be directed; this regardless of want of timely motion by either party in that behalf." (Italics added)

Again in the case of Porter vs. Western N. C. Railway Company, 97 N.C. 66, 2 S.E. 580, the court held that the jury's answers to special interrogatories were inconsistent, requiring a new trial. There the jury answered "no" in response to the question, "Did Plaintiff intestate contribute to his own injury by his negligence." The jury also answered "yes" to the question, "Did Plaintiff's intestate know that the locomotive engineer whose carelessness caused the accident was incompetent, inefficient and careless in the operation of the engine."

In Raymond v. Keseberg, 84 Wis. 302, 54 N.W. 612, the court held that a special finding by the jury that an abutting owner did not use ordinary care and prudence to prevent injury to travelers on the highway would not justify a verdict against such owner without any finding that injury to a traveler resulted from such failure where another special finding held that the injury complained

of was caused by the negligence of the city alone. This, even though it was apparent that the city's negligence must have been that of the abutting owner also.

The impropriety of the court in the instant case is further emphasized by the failure and refusal to take from the jury any of the elements which must be established in order to prove fraud. Although our Supreme Court has in the past outlined nine elements of fraud, the evidence of this case would not justify the submission of each of those elements to the jury. There was certainly no issue on whether the Plaintiff relied upon the alleged representations in making the loans to the Duvall Company. He testified that he did and there is no evidence to contradict such (Tr. 32). Likewise, there could be no contention but that the claimed representation that 300,000 tons of ore had been blocked out as a result of diamond drilling was a representation of a presently existing material fact.

Another reason for pointing out the above inconsistency on the part of the trial court is to emphasize that the case here in question was not one which should have been submitted to the jury upon special interrogatories unless the same were simplified and reduced to a limited number actually applying to the issue of fact in the case. Obviously, counsel for Respondent will urge that because the answers to the first interrogatory (as to whether or not such representation was made) were all in the negative would thereby make it unnecessary to determine whether it was error on the part of the

court to submit the additional interrogatories. In answer to such a proposition, we respectfully submit that the answers to the subsequent interrogatories indicate that the jury must have concluded that representations were in fact made in order to answer such questions. While the court in effect instructed the jury that unless they found a representation to have been made to the Plaintiff as alleged in the Complaint, it would not be necessary for them to consider any further questions, the jury, nevertheless, did proceed to answer subsequent questions as though such representations were made.

Another reason for assigning as error the action of the trial court in submitting the matter to the jury on special interrogatories lies in the lack of complete and adequate instructions on the subject matter in issue—the alleged fraud of the Defendant. In 24 Am. Jur. FRAUD AND DECEIT, Sec. 299, p. 147, is set forth the general rule governing instructions in cases of this kind, as follows:

> "The general rules governing the form and sufficiency of instructions and the necessity for and propriety of giving them are, of course, applicable in actions based on fraud. The court is not permitted to invade the province of the jury in deciding disputed matters of fact in reference to the fraud charged under the guise of instructing them. *The purpose of instructing the jury is to enlighten them by giving them a statement of the propositions of law applicable to the issues to be decided. Hence, the primary requisite of instructions is that they be correct in substance. Accordingly, the instructions relative to fraud*

> *should be correct from the standpoint of the law of fraud and deceit,* and an objection may be properly urged against any instruction which is faulty in this respect, even to the extent of securing a reversal on appeal if the error appears in the record and is prejudicial and the party complaining of the error has not estopped himself by having taken upon the trial the same position as that expressed by the court in the instruction." (Italics added)

In the instant matter, Plaintiff requested several instructions which the court refused under the guise that such instructions were "not appropriate to a special verdict" (R. 34). Such an instruction requested by the Plaintiff, and which was not only proper but should have been given regardless of whether special interrogatories were submitted to the jury, reads as follows:

> "You are instructed that in determining whether or not the plaintiffs, in this case, were induced to advance money to the Duvall Corporation by reason of the representations of the defendant, you may take into consideration the position of the defendant in respect to the plaintiffs, his position and standing in the community, the nature of the business and activities in which he was engaged, the position he occupied with respect to the Duvall Corporation, and all facts and circumstances which you may determine have a bearing on the relationship of the parties to this action."

Likewise, Plaintiffs' Requested Instruction No. 4 was refused, although it should have been given to the jury as a part of the general instructions:

> "You are instructed that a bad motive is not an essential element of fraud, and, therefore, in this case, plaintiffs are not required to prove that the defendant had a bad motive in order to recover from the defendant on plaintiffs' complaint."

Failure of the court to give these requested instructions, and each of them, was excepted to by Plaintiff (Tr. 595). Attention of the court was called to the fact that not only had the instructions as requested been refused but that no instruction covering the same subject matter had been given.

Thus the entire manner in which the case was submitted to the jury was sufficiently confusing that it is impossible to say what the jury would or would not have done in respect to the matter if the case had been submitted to them properly, either upon a general verdict or upon limited number of special interrogatories designed to elicit answers with respect to the issues of fact only and the jury had answered them consistently. We respectfully submit in this case the use of the special interrogatories only confused the jury in respect to the issues before them and resulted in the Plaintiffs not having a fair and impartial trial and leaves the issue of whether the defendant made false and fraudulent representations to the plaintiffs undecided.

II

THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY.

Appellants claim that the court committed several errors in respect to the instructions given to the jury.

In the first place, the court required the jury to find if any of the representations were made "when and as alleged," (R. 82). As indicated above, one of the chief representations claimed to have been made to him by the Defendant was that 300,000 tons of ore had been blocked out as a result of diamond drilling. The jury might well have considered that the representation that 300,000 tons of ore was blocked out was made, but answered the interrogatory in the negative because the other portion of the statement that it was a result of diamond drilling had not been made. Or, the jury may have considered that the representation was made that the amount of ore which the Plaintiff claimed the Defendant represented had been blocked out was approximately 300,000 tons whereas the Complaint referred to the representation that it was not less than 300,000 tons. In either event, the jury should have answered that a representation was made, although made in substance and effect.

We submit that the court should have instructed the jury to answer the Interrogatory numbered 1 in the affirmative if they found that either or all of the representations claimed to have been made were made in substance and effect at or about the time alleged. Failure of the trial court so to do after the matter was called to its attention constitutes reversible error.

Immediately after the parties had rested, and prior to the submission of requested instructions, counsel for Plaintiff in a discussion with the court and opposing

counsel stated that Plaintiff wanted the court specifically to instruct the jury that when a statement was made by Defendant as to any matter, such statement would be continuing and remain until such time as Defendant retracted the statement or Plaintiff became aware of the true facts (Tr. 563). Subsequently, Plaintiff requested such an instruction of the court (R. 43). Although the Requested Instruction (Plaintiff's Requested Instruction No. 12) is marked "given in substance" by the court, such instruction was not given in substance, nor did the court instruct the jury on Plaintiff's theory of the case in this respect.

During the course of the trial counsel for Defendant maintained that with respect to statements made by Mr. Duvall in the spring of 1950 as to the value or gold content of the ore, cost of mining and milling, and percent of recovery were first of all based upon the Engineer's report and at any event were statements concerning a future, rather than a presently existing fact. However, the mine went into production in September 1950, and immediately thereafter it became apparent to Mr. Duvall that the ore was considerably lower in gold content than $7.00 per ton, to-wit: approximately $4.50 per ton; that only one-third of the gold was being recovered from the ore; and that it was costing in excess of $6.28 per ton to extract the gold (not including depreciation, depletion and royalty). (Exhs. H and I, Tr. 101)

Even assuming, for the purpose of argument, that when Mr. Duvall approached Dr. Douglas to loan the

Duvall Mining Company $20,000.00, in the spring of 1950, that from the best source of information available it appeared that there were 200,000 tons of ore, averaging $7.00 per ton available; that it would cost only $3.28 per ton to mine and mill the ore, and that it would be possible to extract 90% of the gold from the ore, nevertheless by the time Mr. Duvall approached Dr. Douglas in December 1950 and asked the latter to mortgage his home and loan the Company another $15,000.00, it was then apparent to Mr. Duvall that all the previous information furnished to Dr. Douglas was false and Defendant then and there had the duty to disclose to the Plaintiff the true facts with respect to assay values, per cent of recovery and production costs. His failure to do so constituted a re-affirmation of the previous statements and representations and a fraud upon Plaintiffs.

The principle of law involved is well stated in the Restatement of the Law of Torts, Vol. 3, Sec. 551, as follows:

> "(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated
>
> (a) such matters as the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them,
>
> (b) *any subsequently acquired information which he recognizes as making untrue or misleading a previous representation*

which when made was true or believed to be so,

(c) the falsity of a misrepresentation which when made was not made for the purpose of its being acted upon if he subsequently ascertains that the other is about to act in reliance upon it in a transaction with him." (Italics added)

In discussing the applicability of Sub-paragraph 2(b), the following illustration, appropro of the present situation, is given:

> "2. A, the president of a mercantile corporation, makes a true statement of its financial position to a credit rating company intending the substance of it to be published by it to its subscribers as is done. The corporation's financial position becomes seriously impaired but A does not inform the credit rating company of this fact. The corporation receives goods on credit from B, a subscriber of the rating company, who when the goods are bought is relying, as A knows, on the credit rating based on his statements to the rating company. A is liable in deceit to B."

There is a presumption in law which arises that once a fact or condition is shown to exist it continues to remain in existence until the contrary is shown, or until a different presumption is raised from the nature of the subject in question. (See 20 Am. Jur., EVIDENCE, Sec. 207, p. 205.) But whether you apply the principle that the matters reported to Dr. and Mrs. Douglas in March, 1950 would be presumed to continue until they had been advised to the contrary, or whether you apply the principles enunciated in the Restatement of the Law of Torts,

the result is the same—the court should have instructed the jury in respect to the matter, as requested by Plaintiffs or otherwise, as long as the theory was properly outlined.

On the cross-examination of Dr. Douglas, he was asked by counsel for the Defendant whether or not he continued to serve as a director of the Company during the period of time that the mine was in operation. Dr. Douglas answered that he did not know whether he was or was not a director, although he attended directors' meetings in good faith "thinking I was a director, but after the mine shut down I went to Lawrence Malan's office . . ." At that time he was interrupted by counsel, who said that "I am not questioning whether you were a director or not, you thought you were a director and purported to act as a director?" (Tr. 84) The only other testimony in the record to the effect that the Plaintiff Douglas ever appeared to be a director in the Duvall Mining Company appears in the testimony of Mr. Duvall who testified that Dr. Douglas had been appointed to the Board of Directors in December of 1950 and thereafter elected to serve on the Board at subsequent stockholders meetings. (Tr. 435, 436)

Upon further cross-examination, Plaintiff answered:

> "Q. Did you as a director ever seek to inform yourself beyond the information you received from Mr. Duvall as to the company's operations and how it was doing?
>
> "A. No.

"Q. Never made any inquiry as a director?

"A. No.

"Q. I take it that at these directors' meetings which you attended the operations of the company were discussed and considered by the directors?

"A. They were discussed some.

"Q. Yes. And I take it that the need of the company to make additional borrowing was discussed at those directors' meetings?

"A. At one or two of them that was discussed, that I attended. You realize that the last three, one was on the night he told me everything was over, and the other one was after it closed down.

"Q. What date did you attend directors' meetings?

"A. I attended them on February 15, October—

"Q. What year, please?

"A. 1951; October 10, 1951." (Tr. 84, 85)

Notwithstanding the dispute as to whether Dr. Douglas was or was not a member of the Board of Directors, the court in its instructions to the jury stated, in commenting that a person should observe and learn what a reasonable person should learn and hear:

"...and that's especially true, Mrs. Nylander and gentlemen, if the person happens to hold the high office of a director in a corporation. As a matter of law, a director had access—that is, in ordinary corporations—to the books and records. He's one of the managers and he's supposed to be on the job and acquaint himself with what's going on. So in connection with this reliance and with this

> continuing representation, if any you find, you must give consideration as to the question of whether this man, whether Mr. Douglas heard anything or did anything or saw anything that would put him on notice, at least as to subsequent transactions." (Tr. 575, 576)

It is Appellants' contention that not only does this instruction in effect advise the jury that Dr. Douglas was a member of the Board of Directors, it further directs them that as a member of such Board he was conclusively presumed to be in possession of all of the information that would be available to him if he had insisted upon looking at the records and books. It was obvious during the course of the trial that the Plaintiff, Douglas, did not have access to the records and books of the company; that by reason of the representations made to him by the Defendant and the latter's position in the community, Plaintiff was induced to rely thereon and lulled into a position of not looking elsewhere for facts which might have legally been available to him as a stockholder in the Duvall Company. (Tr. 87, 88) In any event he did not attend any directors' meetings until February, 1951, at which time three of the so-called loans had been made. Thereafter and during the time that the loans were made by him he attended only one other meeting of the Board of Directors (October, 1951) so that he could not have been in actual possession of facts which would have put him on notice of the financial condition of the company and the mining operations unless he had been advised of such matters in the course of these meetings. Dr. Douglas testified that he was

not so advised. (Tr. 86) Mr. Duvall testified that the matters were always brought up at the meetings as to the operations of the company and as to how things were getting along.

We submit that the court should have instructed the jury that they were to find whether or not Dr. Douglas was in fact a member of the Board of Directors; and that only if they should find that he was a member, would he be required to have knowledge of the facts with respect to the condition of the company. Even then, if the jury should further find that he was induced to rely upon the representations made to him by Mr. Duvall so that he made no inquiry and did not examine the books and records of the company, he would not be charged with knowledge of the true facts.

This matter was discussed between court and counsel prior to instructing the jury where the following comments were made:

> "MR. NIELSEN: I think the court has to instruct the jury that the fact that he's a director, if it is a fact—
>
> "THE COURT: Does not in and of itself alone—
>
> "MR. NIELSEN: —give him knowledge of what took place.
>
> "MR. OLMSTEAD: It doesn't estop him from bringing the action.
>
> "MR. NIELSEN: It didn't impute any facts or knowledge to him.

"THE COURT: Well, it puts him in a position so he can obtain information reasonably.

"MR. WALLER: But it doesn't impute any to him, Judge.

"THE COURT: It puts him in a position to get something.

"MR. NIELSEN: Not any more than a stockholder, Judge.

"THE COURT: A director is a pretty powerful guy.

"MR. CAMPBELL: He doesn't have a duty as a stockholder to find it out." (Tr. 565)

The court failed properly to instruct the jury on this matter so that Plaintiffs respectfully urge that such action was error, requiring a reversal of the judgment and the granting of a new trial.

III

THE COURT ERRED IN COMMENTING UPON THE EVIDENCE DURING THE COURSE OF ITS INSTRUCTIONS.

Perhaps one of the reasons why the Court's instructions in this case are brought into question is due to the fact that the Trial Court instructed the jury orally immediately at the close of the evidence and then had such instructions reduced to writing and given to the jury the following morning when it went to the jury room after the closing arguments of counsel. There is no doubt that the trial court was somewhat hurried and this may account for the failure adequately to cover the

issues involved and correctly and specifically to give the instructions on the law as it applied to the case. The giving of oral instructions tends to open the door to comments by the court with respect to the evidence. Certainly such was the present situation, and the trial court in at least two instances made comments that, Appellants respectfully urge, so invaded the province of the jury in respect to the weight to be given to the evidence as to require a new trial. The law in this State for many years has been, and now is, that in giving its instructions to the jury the court "shall not comment on the evidence in the case." (See former Section 104-24-14, U.C.A., 1943) The foregoing rule is now stated as a part of Rule 51, U.R.C.P.

The comments of the trial court, which are claimed to be error by Appellants, are in substance: First, the trial court, while referring to the fact that the jury may or may not determine that the representations, if any made, were of a continuing nature, went on to say:

> "In this connection, however, *I charge you that a man can't plug up his ears and not observe what a reasonable person should observe and not learn what a reasonable person should learn, and not hear what was said,* if anything was said, concerning the operation of this Company. *And that's especially true, Mrs. Nylander and gentlemen, if the person happens to hold the high office of a director in a corporation.* As a matter of law, a director has access—that is, in ordinary corporations—to the books and records. He's one of the managers and he's supposed to be on the job and acquaint himself with what's going on." (Italics added)

Again, immediately following the above comment the court went on to say:

> "Now, if you find that something like that happened, of the nature that a reasonable man ought to act on, *then you can't award judgment on some representation, because a man can't blow hot and cold.* He either relies or he doesn't rely, and he sees the sun come up in the morning or he doesn't see the sun come up in the morning. If he hears certain things he hears certain things, and if he sees a report he sees a report, and he's charged with what's in there." (Italics added)

The effect of these statements was to impress the jury with the fact that they were to resolve the questions in favor of the Defendant and against the Plaintiffs upon the ground and for the reason that the Court believed that the Plaintiffs had knowledge of the affairs of the corporation or had closed their eyes to information which was available to them. The court did not leave it up to the jury to decide whether they did have such knowledge, but in effect instructed them that Plaintiffs had seen or observed the books and records of the company and had heard and learned of the financial condition of the company during the time the loans were being made.

Actually, Plaintiffs could not have known of the financial position of the company during the spring, summer, and fall of 1950. There is no claim made that they saw any financial report, that the records and books of the company were up to date, or that any written report of assays of the ore were made during that period

of time. No claim is even made by the Defendant that Dr. Douglas was a director during this period of time nor that he saw or had access to the records and books of the Company. Thus for such period of time the court, as a matter of law, should have instructed the jury that he did not see, hear or learn that the representations made to him by the Defendant, Duvall, were false representations of fact.

The law with respect to commenting on the evidence is well stated. In 3 Am. Jur. APPEAL AND ERROR, Section 1055, p. 606, as follows:

> "Generally speaking, the sufficiency of the evidence must be left to the jury. It is reversible error for the court to overstep the limits of the rule in the particular jurisdiction in its comments on the evidence, especially comments on the weight and sufficiency of the evidence, at least if injury results therefrom. There is frequently a question in the individual case as to whether what was said amounted to a comment on the evidence within the prohibition of the rule."

This court, in the case of State vs. Green, 77 Utah 580, 6 Pac. 2(d) 177, made the following statement with respect to commenting on the evidence:

> "There can be no serious doubt but that it was error to give instruction No. 3 and that part of instruction No. 4 which we have quoted. *In this jurisdiction the trial judge is not permitted to comment on the evidence, much less may he indicate to the jury that some material facts, not admitted at the trial, are established beyond controversy.* It is the sole and exclusive province of the jury to determine the facts in all criminal cases,

whether the evidence offered by the state is weak or strong, is in conflict or is not controverted. Evidence may be ever so convincing that an accused is guilty of the crime charged, yet, it is for the jury and not for the trial judge to render the verdict. If the trial judge may not find a verdict of guilty, so, likewise he may not find any of the facts which are necessary elements of the crime for which the accused is being tried." (Italics added)

In a North Carolina case of In Re Bartlett's Will, 70 S.E. 2(d) 482, the court observed:

> "The founders of our legal system intended that the right of trial by jury, whether constitutional or statutory in origin, should be a vital force rather than an empty form in the administration of justice. They realize that this could not be if the petit jury should become a mere unthinking echo of the judge's will. To forestall such eventuality, they clearly demarkated the respective functions of the judge and the jury in both civil and criminal trials in a familiar statute, which was enacted in 1796, and which originally bore this caption: 'An Act to Secure the Impartiality of Trial by Jury, and to Direct the Conduct of Judges in Charges to the Petit Jury'."

The statute referred to stated that "no judge shall give an opinion to the jury in his charge to the jury, whether or not a fact is fully or sufficiently proven, that being the true office and province of the jury."

The court went on to say:

> "This statute is designed to make effectual the right of every litigant 'to have his cause con-

> sidered with the cold neutrality of the impartial judge', and the equally unbiased mind of a properly instructed jury. Withers vs. Lane, 144 N. C. 184, 56 S. E. 855."

We respectfully submit that the foregoing comments to the jury were such as to prejudice the Plaintiffs in obtaining a fair trial. The trial judge himself appeared to recognize the impropriety of his comments for he stated to the jury immediately following that:

> "Well, I may want to correct this a little bit tomorrow morning. We'll see." (Tr. 576)

However, nothing was done to correct the impression given to the jury.

IV

THE COURT ERRED IN REFUSING TO ALLOW COUNSEL TO READ FROM A TRANSCRIPT OF TESTIMONY IN FINAL ARGUMENT.

While there were a number of witnesses called both on behalf of the Plaintiffs and Defendant in this case the principal witnesses, who gave the most crucial testimony in the case, were the Plaintiff, Dr. Douglas and the Defendant, Mr. Duvall. For this reason, it is obvious that in order to present the matter fully and accurately to the jury after a week of trial, a transcript of Mr. Duvall's testimony on examination of him as a part of Plaintiffs' evidence-in-chief, would be desirable and effective in arguing the case to the jury. For this reason, a transcript of such testimony was ordered early in the course of the trial and such fact was well known to

counsel for Defendant, who could have, if they so desired, ordered a similar transcript or a transcript of the testimony of Dr. Douglas. Because counsel for the Plaintiff intended to read the transcript of such testimony to the jury in the course of his argument, the specific matters with respect to the admissions made by Mr. Duvall as to his statements during the original conversation between him and Dr. Douglas in March of 1950, as well as his knowledge with respect to the representations made on that occasion and subsequently, was not digested and summarized for the purpose of presenting it to the jury in narrative form.

When counsel for Plaintiff made his opening remarks to the jury, he advised them that because the trial had been long and involved and because it would be difficult to remember the testimony which had been presented on behalf of Plaintiffs' Complaint at the beginning of the trial, he desired to read to them some of the testimony of the Defendant, Duvall, and particularly that portion of his testimony which had been elicited on examination by counsel as a part of the Plaintiffs' case. Immediately counsel for the Defendant arose to his feet and stated:

> "MR. YOUNG: I hesitate to interrupt counsel in his argument, but at this time the defendant desires to take exception to the statement of counsel, and particularly to any attempt, as indicated by his statement, that he has had transcribed and will read to this jury excerpts of testimony which have been given. In our opinion that would be highly prejudicial. The jury are here to try all the facts, and you cannot read even from a deposition. It's a question of the jury remembering

the evidence, and it would unduly emphasize certain parts of the evidence, and we object at this time and ask the court to instruct counsel that such conduct would be prejudicial.

"MR. NIELSEN: Well, if your Honor please, I'm sure I'm entitled to read just as the jury, if they want to hear any of the testimony, are entitled to have any of it read to them. There's nothing any court has ever said that counsel can't either recall it specifically from memory or by the written word." (Tr. 582, 583)

It is interesting to note that Mr. Young (Defendant's attorney) apparently was under the impression that as a matter of law it was impossible to read from any transcript of testimony in argument to the jury. This also appeared to be the Court's view of the matter, for when counsel for the Plaintiff stated that there was nothing in the law that would require the court to prohibit counsel from reading from the transcript the court stated:

"THE COURT: That hasn't been our ground rule up in the far country up here." (Tr. 583)

As Mr. Young indicated the reading the testimony of Mr. Duvall to the jury would of course impress the members and help them to recall the testimony which had been presented in the early days of the trial to weigh it against the testimony introduced by Defendant during the subsequent days of the trial. This certainly would have been of considerable value to the jury in refreshing the recollections of the individual jurors. The trial judge, however, concluded that he did not have a right

to allow counsel to read from the testimony and therefore ruled against Plaintiff, the following conversation taking place:

> "MR. NIELSEN: Well, of course, if your Honor says I can't read it to them I won't.
>
> "THE COURT: I may be in error. I hesitate to let you start reading from excerpts.
>
> "MR. NIELSEN: If your Honor says I can't I won't, but I will take exception to the Court's refusal to let me read it.
>
> "THE COURT: That's understood." (Tr. 583)

The law is well settled that while the trial court has discretion in a particular case to control the conduct of counsel during the closing argument, nevertheless it is equally well settled that counsel should be allowed to read from the testimony of the witnesses if read from the official transcript. The rule is stated in 53 Am. Jur. TRIAL, Sec. 463, p. 368, as follows:

> "While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, arraign the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions. *He may*

repeat the evidence verbatim for the purpose of commenting on it in the connection in which it was introduced at the trial, or he may refresh his recollection of the testimony by reading from the notes of the official reporter.'' (Italics added)

In the case of State v. Burns, 148 Mo. 167, 49 S.W. 1005, the court stated:

> ''Counsel for the State did not transcend the evidence in alluding to the impeaching testimony of the witness Clara Hunter. *He repeated her evidence verbatim in commenting upon the evidence of Defendant's mother. It was legitimate for that purpose, and was employed in that way only.''* (Italics added)

In Gephart v. Stout, 11 Wn. (2d) 184, 118 P. (2d) 801, the action of the trial court in permitting Plaintiff's counsel to read to the jury a portion of the testimony of certain witnesses from a transcript of the evidence, over Defendant's objection that the whole of the evidence of the witness should be read, was held not to be an abuse of discretion.

See also: Aasen v. Aasen, 228 Minn. 1, 36 N.W. 2d 27; Bonderson v. Hovde, 150 Minn. 175, 184 N.W. 853; Killam v. Travelers Protective Ass'n. of America, (Missouri 1939) 127 S.W. 2d 772; State v. Perkins, 143 Ia. 55, 120 N.W. 62.

In the recent case of *Westling v. Holm,* (Minnesota), 58 N.W. 2d 252, counsel began to read from a transcript of the testimony, stating, ''And here is the precise testimony on that point,'' whereupon the court ruled

that he could not read from the paper "as a transcript" but allowed counsel to read the material as being his "absolute, honest, true and correct recollection of the evidence." On appeal error was assigned is not permitting counsel to read from the "transcript" as the official transcript of the evidence. In passing on the point the court held:

> "Whether the trial court abused this discretion by directing counsel not to refer to the document as a 'transcript' would not seem to be material here. Counsel read portions of the testimony which he deemed material, and in view of the repeated references to the document as a transcript as outlined above, there can be little doubt that the jury was aware that it was from the court reporter's transcript of the testimony. It follows that no prejudice resulted from the ruling."

In the instant matter counsel was not allowed to read from the document as the transcript of testimony or otherwise and therefore the error of the trial court was prejudicial. The very effect of the court's ruling on the jury was such as to preclude them from requesting that their recollection be refreshed as to the testimony given during the first days of the trial.

V

THE COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE PLAINTIFFS UPON ALL OR PART OF PLAINTIFFS' COMPLAINT.

As one of their Requested Instructions Appellants requested the court to direct a verdict in favor of Plain-

tiffs and against the Defendant on the complaint. (R. 33) In addition, Plaintiff made a motion for a directed verdict in respect to the loan made by Plaintiffs to the Duvall Mining Company on December 4, 1950, as follows:

> "MR. NIELSEN: I have a motion that I would like to make. We move that the court direct the jury as a matter of law to return a verdict upon the transaction referred to in Exhibit "X" as transaction . . . three . . . upon the ground and for the reason that the evidence as a matter of law shows that at that time the defendant was within and in possession of knowledge which he failed to impart to the plaintiff in any way changing or correcting the evidence which he himself gave that he had previously represented to the plaintiff, that according to the reports of the engineers and otherwise, that the ore to be produced from said mine would be of a value of approximately seven dollars per ton, when on December 4, 1950, he in truth and in fact knew that the value of such ore did not exceed approximately five dollars per ton; and upon the further fact that the evidence is undisputed that he knew at that time that the cost of producing the gold from the ore was in excess of nine dollars per ton and that he had failed to retract or change his previous representation that it would not cost in excess of three dollars and fifty cents per ton to produce the gold from such ore." (Tr. 590, 591)

Appellants' position and contention with respect to this point is somewhat related to the argument made that the Court was under the duty to instruct the jury with respect to the continuing nature of any representations in the absence of any retraction on the part of Defendant or knowledge of a change of conditions on the part of

Plaintiffs. While it is not Appellants' intention to argue at this time that the trial court should have directed a verdict for Plaintiffs on the entire complaint, it is respectfully urged that the trial court should have directed a verdict as to the specific loan made on December 4, 1950. In making this contention Appellants rely primarily upon the testimony of the Defendant Duvall, although the testimony of Plaintiffs' witnesses certainly support and sustain such position.

During the presentation of Plaintiffs' evidence, the Defendant Duvall was called to be examined under the provisions of Rule 43(b), U.R.C.P. Previously Dr. Douglas had testified that when Mr. Duvall had called the Douglases into Duvall's office in the Ogden First Federal Savings and Loan Association, Duvall had told the Plaintiffs in substance and effect that "they had already blocked out and diamond drilled 300,000 tons of ore ranging in price from about three and a half or four dollars a ton up to fifteen or sixteen, and he showed me a blue print with those figures on and intermittently there were figures like nine something and eleven something, and he said, 'It even has gold that assays as high as $50 a ton;' " (Tr. 28) that the ore averaged seven or eight dollars per ton; (Tr. 30) and that "the entire cost of producing this ore would be in the neighborhood of two and a half to three and a half dollars a ton, the entire cost." (Tr. 31)

Plaintiff further testified that in the early part of December 1950 Mr. Duvall asked Plaintiff to come to

Duvall's office in the Ogden First Federal where Duvall stated they "were going to expand the operation and they were going to need new equipment and they were going to have to raise some money"; (Tr. 36) that Duvall would loan Plaintiffs $15,000 on their home; (Tr. 37) that Plaintiff borrowed the money and loaned it to the Duvall Company because of the previous, as well as the immediate, representations made to them. (Tr. 88)

Plaintiff further testified that subsequent to the first conversation which took place in March 1950, Mr. Duvall never changed or contradicted the original representation as to the amount of ore blocked out, or the cost of producing the gold from the ore, or the value of the ore being produced; (Tr. 53) that at all times when making the loans to the Duvall Mining Company Plaintiff relied on Mr. Duvall's judgment as a banker, and had in mind the original representations which Mr. Duvall had made concerning the quantity of ore and the cost of producing it; that this information, together with the other representations subsequently made, induced the various loans. (Tr. 88, 89)

Defendant's version of the original conversation which took place in his office in March 1950 was somewhat different in that Defendant testified that he showed the engineer's report (Defendant's Exh. 2) to Dr. Douglas and went over it in some detail; that Defendant relied on the report and that the blue print testified to by Dr. Douglas was prepared by Mr. Romney and contained result of ore sampling. (Tr. 411, 412, 422). With respect

to the loan made in December 1950, Mr. Duvall testified that "at that particular time it was concluded that changes would be necessary in the plant and that we would have to make some changes and improvements and that the money would undoubtedly be needed, and perhaps the money may have been needed in connection with work that had already been done. I do not remember the details completely of that conversation." (Tr. 430) He further testified, after counsel for Defendant asked him if he recalled discussing with Dr. Douglas anything in connection with the loan that "if I remember correctly, Dr. Douglas stated that in order to make the company a loan he would have to borrow money upon his home, and a discussion took place in connection with that; and I did agree, if I remember the dates and the time correctly, that I did make him a loan with which to loan this money to the company; a loan upon his home." (Tr. 431)

Following this answer, he was again asked by his counsel:

> "Q. Do you recall in particular any specific statements that were made by you to him at or about this time and in connection with this loan?"

To which he replied:

> "A. I do not recall in detail the statements that were made to him."

We are therefore left to the unescapable conclusion that Defendant did not bring to the attention of Dr.

Douglas Defendant's knowledge of what had taken place at the mine during the summer of 1950, and particularly Defendant did not change or correct the representations made in March 1950—whether such representations were as contained in the engineer's report or as testified to by Dr. Douglas.

As to his familiarity with conditions during the summer and fall of 1950, Defendant testified that he was familiar with activities from month to month; (Tr. 101) that Mr. Romney was keeping a day to day record which was available to Defendant and which he saw frequently; (Tr. 103) that he knew that the Company was not receiving more than about $2.00 per ton out of the ore being produced; that "it was not a good recovery"; and that he knew when he approached Dr. Douglas for a loan in December 1950 that the company had sustained an operating loss (before depreciation and depletion) or something like $21,537.44. (Tr. 104) He further admitted that he was familiar with the information contained on Exhibits H, I, and J during the course of the summer and fall of 1950; that daily records were kept by Mr. Romney at the mine which he saw at least once a week (Tr. 115). He further testified on cross-examination that when the loan was made on December 4, 1950 he "certainly knew that the recovery on the ores and the receipts from the smelter were not equalling the expenses that we were paying out for equipment and operations," (Tr. 142) and that "I knew that we were not receiving sufficient funds to pay the operating costs." (Tr. 505)

Plaintiffs' Exhibit M further illustrates what the operations were in the year 1950, as well as in subsequent years was corroborated by Mr. Romney (Tr. 370).

After having testified in substance as outlined above, the Defendant further testified, upon being pressed by counsel on cross-examination, as follows:

> "Q. Now, Mr. Duvall, you previously testified that as early as the first shipment in September and October of 1950, you realized then how much you were getting out of the ore you were producing, did you not?
>
> "A. September and October of 1950?
>
> "Q. Yes.
>
> "A. Well, in September of 1950 were the first few shipments, and October. And we realized that those shipments were not, certainly not ninety per cent or anywhere near that.
>
> "Q. And you knew at that time that the assays of the ore that was going into the tanks was less than $5.00 per ton, didn't you?
>
> "A. I don't remember the exact amount of that, but there were variations in the body of ore as to values, so that might not have concerned us too much if we were starting on a point that was in what we term lower or higher grade areas.
>
> "Q. But you did know that the checks that you were writing out were considerably more than what you were bringing in in terms of values of the gold, weren't they?
>
> "A. Very definitely.
>
> "Q. And so by the time the mine shut down about the last of November or the first of Decem-

ber, you were confronted with the situation of having to raise about $15,000 to $25,000 to pay the bills that were outstanding for that year's operation, weren't you?

"A. That is probably true.

"Q. And it's a fact, is it not, Mr. Duvall, that you didn't tell Mr. Douglas, when he came in and you asked him to mortgage his home to you on or about December 4, that the reason you wanted this money was to pay these bills because the operation was a losing proposition in 1950? Just answer that if you did or did not tell him.

"A. I can't answer that, whether I did or did not, without an explanation."

The foregoing testimony clearly puts this situation within the specific language of Section 551, subsection (2)(b) and the accompanying illustration, contained in the Restatement on the Law of Torts. We therefore submit that the court should have so directed the jury to return a verdict in favor of Plaintiffs at least on the loan made by them on December 4, 1950. As previously stated the court should have made further directions to the jury which would have limited the issues to be resolved by the jury on the other loans made.

CONCLUSION

In conclusion Plaintiffs respectfully submit that the trial court should have directed a verdict in Plaintiffs' favor as to the loan made in December 1950 and should have submitted the remainder of the case to the jury on instructions which would have limited the issues to be

decided. In so doing the court should not have submitted the case to the jury on detailed written interrogatories, allowing them to speculate on issues concerning which there was no dispute in the evidence. Too, the court failed properly to instruct the jury on finding the representations to have been made substantially as alleged and improperly commented on the evidence during the giving of the instructions. The court likewise failed to instruct the jury with respect to the duty of the Defendant to correct or change any statement or representation subsequently determined to be incorrect. And finally, the Court improperly refused permission to counsel for the Plaintiffs to read from a transcript of the testimony in final argument and summation to the jury.

Respectfully submitted,

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